BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHINDA A. HARVEY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 189,623
TARGET/DAYTON HUDSON	)	& 206,303
Respondent	)	
AND	)	
	)	
DAYTON HUDSON CORP. D/B/A TARGET	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Award of Administrative Law Judge John D. Clark dated March 2, 1998. Oral argument was heard in Wichita, Kansas, on October 9, 1998.

APPEARANCES

Claimant appeared by her attorney, David H. Farris of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, William L. Townsley, III, of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) What is the nature and extent of claimant's disability, if any?

(2) What is claimant's average weekly wage for each date of accident?

At oral argument, the parties advised the Appeals Board that the issue dealing with claimant's entitlement to unauthorized medical benefits had been resolved between the parties and was no longer before the Appeals Board for consideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 189,623

Findings of Fact

The first claim (Docket No. 189,623) arises out of an accident occurring on April 14, 1993. On that date, claimant sustained injury to her right knee when she slipped and fell on a wet floor. At the time, claimant was a retail price changer responsible for changing prices, pulling stock, and loading and unloading trucks. Claimant also alleges that on April 14, 1993, she injured her back at the time of the fall. Claimant notified her supervisor and was referred to Dr. Kenneth A. Jansson, a board certified orthopedic surgeon, who confines his practice to primarily knee surgery. After a period of conservative treatment, Dr. Jansson performed an arthroscopy on claimant's knee on February 25, 1994. Dr. Jansson found that claimant's kneecap was shifted to one side and she had a grade 2 change of the cartilage on the back of her kneecap. During surgery, he performed a debridement and a lateral release, and postoperatively placed her on physical therapy. Claimant had some relief, but the result was not as positive as Dr. Jansson had hoped. A bone scan showed some diffuse increased uptake around the knee.

By September 1994, claimant had reached maximum medical improvement. Dr. Jansson assessed her a 15 percent impairment of the lower extremity. He last saw claimant on November 17, 1994. He restricted claimant from lifting over 25 pounds, and advised against climbing ladders, kneeling or squatting, and advised she spend half of her day sitting.

Claimant returned to work with respondent, and the restrictions placed upon her were accommodated. Claimant testified that, as she walked, she developed an altered gait, which claimant alleges worsened her underlying back condition.

Claimant was examined by Dr. Ernest Schlachter at her attorney's request on October 18, 1994. At that time, he assessed claimant a 5 percent impairment to the body as a whole for her chronic lumbosacral sprain, secondary to her altered gait, a 15 percent impairment of the right lower extremity which converts to a 6 percent whole body impairment, and a 5 percent impairment of the left lower extremity which converts to a 2 percent whole body impairment for the bilateral chondromalacia of claimant's knees, with the right previously operated. This combines to a 13 percent permanent partial impairment

of function to the body as a whole. This was the only time Dr. Schlachter examined or rated claimant for these injuries.

Both Dr. Schlachter and Dr. Jansson noted claimant was overweight, which would make one inclined to develop problems in their knees and low back. Dr. Schlachter did not have available x-rays of claimant's back or left knee at the time of his examination.

Dr. Jansson was cross-examined extensively regarding whether an injury to a knee causing an altered gait could lead to the exacerbation of a preexisting back problem. He felt it would be extremely rare for a back problem to be caused by an altered gait, especially in a person with an otherwise healthy back. He did acknowledge it is possible for someone to aggravate a preexisting back problem with an altered gait. He has examined thousands of knees worse than claimant's, and most people have no back problems at all. He felt claimant's complaints of pain were more severe than most people he sees with the same amount of objective findings, but acknowledged that pain is an extremely subjective finding.

On June 14, 1995, while continuing in the employment of Target, claimant slipped on a misplaced board, lurching her body forward and again injuring her back. She did not fall. She did immediately notify her supervisor of the problems, and was referred to Dr. Val Brown for treatment.

On June 20, 1995, claimant and respondent entered into the running award in Docket No. 189,623, based upon Dr. Jansson's 15 percent permanent partial impairment to the right leg, and an average weekly wage of $274 per week. The claimant argued the stipulations contained in the Agreed Award acknowledged that the award was to the right knee only, with the claimant being granted the right to address the left knee and back injuries in future proceedings. Respondent disputes this interpretation. The Appeals Board finds that language allows a determination of future medical treatment for the left knee and back, but not a Review and Modification of the Agreed Award.

On June 24, 1997, claimant filed an Application for Review and Modification pursuant to K.S.A. 1992 Supp. 44-528. The application was based upon claimant's contention that her gait had been altered by the knee injury, resulting in an impairment to her back, which would entitle her to an award of a whole body impairment and a work disability.

The Administrative Law Judge, after considering the evidence, found that claimant had failed to prove an increase in impairment in her back or her right leg which would be related to the knee injury.

Conclusions of Law

K.S.A. 1992 Supp. 44-528(a) states in part that review and modification may be granted if:

> [T]he director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished . . . .

However, review and modification is not available where the findings upon which the award is based were of a past fact. Coffee v. Fleming Company, Inc., 199 Kan. 453, 430 P.2d 259 (1967).

In this instance, claimant entered into an Agreed Award on June 20, 1995, knowing full well the Agreed Award allowed for a 15 percent impairment to the lower extremity only. No additional impairment was granted for the left knee or the back. The evidence upon which claimant relies, that of Dr. Ernest Schlachter, was available in 1994 when Dr. Schlachter last examined claimant. Therefore, the disputed condition which claimant resolved in the running award in 1995 is the same condition which exists today. There has been no change in condition to either claimant's right leg or back as a result of the injury suffered on April 14, 1993. Therefore, the Appeals Board finds that the decision by the Administrative Law Judge denying claimant additional disability for having failed to prove an increase in impairment or disability should be affirmed.

Claimant is entitled to all outstanding unauthorized medical up to the statutory limit, with future medical to be provided upon proper application to and approval by the Workers Compensation Director.

Since no additional compensation was found due, the issue dealing with claimant's average weekly wage from the April 14, 1993, accident is rendered moot.

Docket No. 206,303

Findings of Fact

Claimant continued working for respondent after her April 14, 1993, injury with accommodation. On June 14, 1995, claimant suffered the second accident when she turned to leave the office, tripping over the board.

Claimant was taken off work for a period of time and released back to work with respondent with restrictions. As was the case in the past, respondent continued to accommodate the restrictions provided claimant.

Prior to the preliminary hearing scheduled for January 30, 1996, the parties agreed that Dr. Bernard T. Poole, a board certified orthopedic surgeon, would be authorized to provide claimant treatment for her low back injuries. Dr. Poole examined claimant on two occasions, the first being in March 1996. At that time, he felt claimant could walk relatively normally, and could find no evidence of any neurological injury or disease. Claimant's cervical spine showed a normal contour with some tenderness at C5-6. X-rays of the cervical spine did indicate chronic degenerative changes in both the facet joints and the discs at C6-7. Dr. Poole noticed a slight increase in the lumbar lordosis and a slight tenderness in the paravertebral muscles from L3 to S1. Claimant, however, displayed a normal range of motion during the examination.

Dr. Poole described claimant as a somewhat overweight lady with degenerative changes in her neck, lumbar spine and right knee. He described claimant as being 5'7", weighing 230 pounds which he felt was overweight, but not grossly so. He described the incident on June 14, 1995, as a relatively trivial injury, and opined that claimant had no measurable disabilities resulting from that injury. He last examined claimant on March 19, 1996, finding no ongoing orthopedic treatment was required. He did not believe claimant had any identifiable degree of disability attributable to the episode at work, and assessed claimant no permanent functional impairment as a result of the injury.

Claimant was referred to Dr. Pedro A. Murati, a board certified physiatrist, on March 20, 1997, by her attorney. Dr. Murati diagnosed chronic lumbosacral strain, and recommended the same restrictions as provided by Dr. Brown and Dr. Jansson. He assessed claimant a 12 percent permanent partial impairment of function to the body as a whole, but deducted the 5 percent permanent partial impairment given claimant by Dr. Schlachter under the previous case. The Appeals Board does not find this previous impairment to be supported by the evidence, and rejects same for the purpose of this award. This resulted in a 7 percent permanent partial impairment of function to the body as a whole. He felt claimant's condition had worsened as a result of the June 1995 work-related injury, and his impairment and work restrictions took that additional injury into consideration.

In February 1997, claimant was advised by respondent that her position was being eliminated. Claimant was offered two separate positions with respondent. Respondent's representative, Debbie Stephens, the personnel manager with Target, advised that respondent had always met the restrictions provided by claimant's treating physicians, and they intended to accommodate claimant in the future. Claimant was offered a position as a lead cashier, which would be on the same level as claimant's current job, or claimant could take a demotion to a level one position. Mr. Norton advised claimant that respondent

would be willing to accommodate her in any way necessary. Claimant asked for time to consider the offer. One week later, claimant provided a letter to respondent, rejecting the offered positions. Claimant advised in the letter that the first position violated her restrictions, even though respondent's representative had advised that the restrictions would be accommodated. Claimant advised the second job was being rejected because it represented a reduction in salary and a reduction in seniority.

With regard to claimant's average weekly wage, the parties have stipulated to a base wage of $370. Evidence was provided to show that claimant received life insurance and contributions into a 401k plan. The record is not clear as to how much of the life insurance or 401k contributions were made by claimant and how much was contributed by respondent. Claimant does acknowledge that certain sums were deducted from her paycheck on a regular basis to at least partially pay for the life insurance and 401k programs. However, the evidence also disclosed that claimant's participation in the family health plan had been discontinued several months prior to the date of accident, as she was transferred to her husband's health insurance plan.

Conclusions of Law

In proceedings under the Workers Compensation Act, the burden of proof is upon claimant to establish the claimant's right to an award of compensation, and to prove the various conditions upon which claimant's right depends by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 44-508(g). In this instance, claimant has failed to prove any additional wage beyond the $370 base wage agreed to by the parties. While claimant was receiving additional benefits in the form of life insurance and the 401k plan, the evidence is unclear how much contribution was made by claimant and how much was actually contributed by respondent. As such, the Appeals Board finds claimant's average weekly wage to be $370 per week.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board must consider the opinions of both Dr. Murati and Dr. Poole. This injury on June 14, 1995, deals with claimant's low back. Neither Dr. Jansson nor Dr. Schlachter had the opportunity to consider claimant's back as it relates to a June 1995 injury. Dr. Jansson acknowledged he only deals with knees, and Dr. Schlachter examined claimant only once in 1994.

Dr. Poole, the respondent's appointed medical examiner, examined claimant only twice. Dr. Murati examined claimant at her attorney's request on only one occasion. The Appeals Board finds neither doctor had a significant advantage in the evaluation of claimant and her limitations. This is not a situation where a treating physician has the opportunity to examine and treat a patient over a period of several months or several years, and thus gains a distinct advantage in being able to assess and evaluate a patient's ongoing limitations and injuries. In this instance, both Dr. Murati and Dr. Poole appear to

be fairly equal in their ability to assess claimant and in their opportunities to evaluate claimant's condition. Dr. Murati found claimant to have suffered a 12 percent permanent partial impairment to the body as a whole from her chronic lumbosacral strain. Dr. Poole felt claimant's condition was stable, and he found no evidence of any functional impairment resulting from the June 14, 1995, accident, which he described as being relatively trivial. The Appeals Board acknowledges that the trauma suffered by claimant on June 14, 1995, was a minor incident. However, on more than one occasion in the past, evidence has indicated that minor incidents can lead to significant permanent impairments. In this instance, the Appeals Board gives no greater weight to the opinion of Dr. Poole than that of Dr. Murati, and finds that the zero percent impairment of Dr. Poole is low, and the 12 percent whole body impairment of Dr. Murati is high.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Appeals Board finds that claimant has suffered a 6 percent permanent partial impairment to the body as a whole as a result of the injuries suffered on June 14, 1995.

Claimant argues entitlement to a work disability under K.S.A. 44-510e as a result of the injuries suffered on June 14, 1995. However, the Appeals Board must take into consideration the respondent's contention that claimant has violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act in Kansas should not be construed to award benefits to a worker for refusing to attempt a proper job that the worker had the ability to perform. In this instance, respondent made a definite offer of employment to claimant, specifying two particular jobs, and agreeing that appropriate accommodation would be made. The Appeals Board has seen occasions where offers of accommodation have been hollow and apparently intended only for the purpose of workers compensation litigation. In this instance, however, respondent had a policy of accommodating medical restrictions and accommodated claimant's limitations after the April 1993 accident. There is no evidence which indicates respondent's policy regarding accommodation would change in this situation. Claimant's refusal to attempt the two jobs, in light of respondent's offer to accommodate, appears unreasonable. While claimant argued the first position offered violated her restrictions, respondent made it clear that that was not an insurmountable hurdle, and accommodation would be made. In addition, claimant's objection to the second position had nothing to do with the restrictions or violation of restrictions, but instead dealt with the amount of compensation which would be provided for that position.

The Appeals Board finds, when considering the offers provided by respondent, that claimant violated the principles of Foulk in refusing to attemp those jobs, and is, therefore, limited to her functional impairment.

AWARD

Docket No. 189,623

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision by the Administrative Law Judge denying claimant additional disability for having failed to prove an increase in impairment or disability should be, and is hereby, affirmed.

Claimant is entitled to all outstanding unauthorized medical up to the statutory limit, with future medical to be provided upon proper application to and approval by the Workers Compensation Director.

Docket No. 206,303

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated March 2, 1998, should be, and is hereby, modified, and claimant, Richinda A. Harvey, is a granted an award against Target/Dayton Hudson for an injury occurring on June 14, 1995, and based upon an average weekly wage of $370, for a 6 percent permanent partial impairment to the body as a whole.

Claimant is granted 0.86 weeks temporary total disability compensation at the rate of $246.68 per week, totaling $212.14. This represents an underpayment of $42.68. Thereafter, claimant is entitled to 24.9 weeks permanent partial disability compensation at the rate of $246.68 per week, totaling $6,142.33, for a total award of $6,354.47, all of which is due and owing in one lump sum minus amounts previously paid as of the time of this award.

Future medical benefits will be awarded upon proper application to and approval by the Director.

Unauthorized medical expenses are granted upon presentation of an itemized statement verifying the utilization of same.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting	
Transcript of regular hearing	$238.80
Bannon & Associates	
Deposition of Ernest R. Schlachter, M.D.	$146.60
Deposition of Jerry D. Hardin	$192.70
Deposition of Jerry D. Hardin	$155.00
Deposition of Pedro A. Murati, M.D.	$156.80
Deposition of Debbie Stephens	$265.00
Deposition of Tim R. Norton	$168.40
Deposition of Richinda A. Harvey	$210.60
Deposition of Karen Crist Terrill	$223.60
Deposition of Kenneth A. Jansson, M.D.	$298.00
Deposition of Bernard Poole, M.D.	$107.50

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
William L. Townsley, III, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director